Enforcing Environmental Regulations: Concentrated Animal Feeding Operations

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I. INTRODUCTION

The production of animal waste has garnered considerable attention in recent scholarship,[1] and spurred efforts within the Environmental Protection Agency (EPA) and the U.S. Department of Agriculture to reduce pollution from animal feeding operations (AFOs).[2] As a result, new federal regulations

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1. *See, e.g.*, Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175 (2002) (advocating greater regulatory attention to jurisdictional boundaries for regulating animals); Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219 (2000) (advocating incentives for conservation buffers to intercept nutrient pollution); Terence J. Centner, *Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence*, 27 VT. L. REV. 115 (2002) [hereinafter Centner, *View of the Evidence*] (exploring the quality of evidence being cited to justify new federal regulations for CAFOs); Theodore A. Feitshans & Kelly Zering, *Federal Regulation of Animal and Poultry Production Under the Clean Water Act: Opportunities for Employing Economic Analysis to Improve Societal Results*, 10 PENN ST. ENVTL. L. REV. 193 (2002) (advocating regulations that consider social welfare and efficiency); Robert Innes, *The Economics of Livestock Waste and Its Regulation*, 82 AM. J. AGRIC. ECON. 97 (2000) (suggesting alternative regulatory institutions); Mark Metcalfe, *State Legislation Regulating Animal Manure Management*, 22 REV. AGRIC. ECON. 519 (2000) (noting that new state legislation may obviate the need for duplicative and disruptive federal action); Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367 (2002) (discussing problems with CAFO regulations); Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented By Community Conflicts Over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295 (2002) (evaluating decision making processes to address CAFO-related disputes); Amy Willbanks, *The Unified National Strategy for Animal Feeding Operations: Another Federal-State Partnership in Environmental Regulation*, 8 S.C. ENVTL. L.J. 283 (2000) (intimating that the federal government will become more active in responding to water pollution problems); David R. Gillay, Comment, *Oklahoma's Concentrated Animal Feeding Operations Act: Balancing the Interests of Landowners with the Exponential Growth of the Hog Industry*, 35 TULSA L.J. 627 (2000) (analyzing one state's regulations).

2. *See* Notice of Data Availability; National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for

management practices appropriate on a nationwide basis.[97] States need to determine what further practices are appropriate at a more localized level to achieve required effluent limitations.[98] Permitted CAFOs must develop and implement nutrient management plans by December 31, 2006.[99]

III. FOCUSING ON GREATER ENFORCEMENT

While the revised regulations address potential discharges of pollutants at 2,800 additional operations,[100] there is some question whether state governments are successfully implementing NPDES requirements. Public interest groups maintain that state enforcement of federal law is not working.[101] An examination of major facilities showed that 81 percent of CAFOs exceeded their Clean Water Act effluent permit limits over the two year period ending December 31, 2001.[102] An estimated 30 percent of major facilities were in significant noncompliance over a fifteen month period.[103] Moreover, the lax enforcement of federal air and water quality regulations by the EPA may be costing the federal government more than $20 million in penalties per year.[104]

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97. Federal CAFO Regulations, *supra* note 3, at 7212. The revised regulations do not cover practices such as manure application to frozen, snow-covered, or saturated ground. *Id.*

98. *Id.* State regulators need to establish these future practices in time to allow permitted CAFOs to develop and implement nutrient management plans by the December 31, 2006 deadline. *Id.* at 7268. Local governments may decide to go further and enact local ordinances to protect the health and welfare of citizens. Upchurch v. Cumberland County Fiscal Court, No. 2000-CA-002607-MR, 2003 Ky. App. LEXIS 22 (Ky. Ct. App. Jan. 31, 2003).

99. Federal CAFO Regulations, *supra* note 3, at 7268.

100. Approximately 15,500 AFOs are expected to meet the definition of a CAFO under the revised regulations. *Id.* at 7244. This may be contrasted to the 12,700 operations that were considered CAFOs under the former regulations. EPA Proposed Rule, *supra* note 17, at 3080.

101. TONY DUTZIK, THE STATE OF ENVIRONMENTAL ENFORCEMENT: THE FAILURE OF STATE GOVERNMENTS TO ENFORCE ENVIRONMENTAL PROTECTIONS AND PROPOSALS FOR REFORM 5 (Colo. Pub. Interest Research Group Found., Oct. 2002).

102. U.S. PUB. INTEREST RESEARCH GROUP, IN GROSS VIOLATION: HOW POLLUTERS ARE FLOODING AMERICA'S WATERWAYS WITH TOXIC CHEMICALS 10 (Oct. 2002). The ten states with "the highest percentage of major facilities to exceed their Clean Water Act effluent permit limits" included Ohio, New York, and Indiana. *Id.* at 9.

103. RICHARD CAPLAN, U.S. PUB. INTEREST RESEARCH GROUP EDUC. FUND, PERMIT TO POLLUTE: HOW THE GOVERNMENT'S LAX ENFORCEMENT OF THE CLEAN WATER ACT IS POISONING OUR WATERS 6 (Aug. 2002).

104. U.S. PUB. INTEREST RESEARCH GROUP, U.S. EPA ALLOWS POLLUTERS TO PAY LESS FOR VIOLATIONS OF ENVIRONMENTAL LAWS, GIVING VIOLATORS AT LEAST A $55 MILLION WINDFALL OVER THE LAST TWO YEARS 1 (Jan. 2003).

opportunity to garner increased self-monitoring of management practices.[249] The additional self-monitoring practices accompanying co-permitting would have resulted in greater compliance with the NPDES permit requirements.

V. CONCLUSION

The federal government's revised CAFO regulations make important changes that should lead to improvements in the quality of our nation's waters. The removal of exceptions, the enumeration of further requirements, and the coverage of additional operations comprise significant revisions that should eliminate many practices leading to water impairment.[250] At the same time, the failure to incorporate several proposed provisions may allow operations to continue with activities that degrade water quality. The government declined to require groundwater monitoring, did not make the effluent limitation guidelines mandatory for medium- and small-sized CAFOs, and omitted limits on metals, pathogens, and antibiotics.[251]

Data concerning the implementation and enforcement of the federal CAFO provisions by authorized states suggest that unacceptable impairment of waters by AFOs is not simply a function of the number of operations regulated. Rather, the lack of compliance with existing regulations is part of the problem[252] since facilities are presently allowed to violate permit conditions

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249. After the release of the final CAFO regulations, the General Accounting Office published a report showing deficiencies in state enforcement of CAFO regulations. GAO 2003, *supra* note 2. The EPA's decision not to institute co-permitting requirements missed an opportunity to assist state regulators.

250. *See supra* notes 33-99 and accompanying text.

251. Terence J. Centner, *New Regulations to Minimize Water Impairment from Animals Rely on Management Practices*, 30 ENVTL. INT'L 539, 544 (2004).

252. *See* GAO 2003, *supra* note 2, at 7-10. Other opportunities also exist to reduce the contaminants from AFOs from entering waterbodies. In some cases, additional voluntary measures might address problems. U.S. DEP'T OF AGRIC. AND U.S. ENVTL. PROT. AGENCY, UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS § 4.1 (Mar. 9, 1999). Greater use of appropriate buffers to separate production and land application areas from surface waters might reduce discharges of nutrients. *See, e.g.*, VICKI CHASE ET AL., BUFFERS FOR WETLANDS AND SURFACE WATERS: A GUIDEBOOK FOR NEW HAMPSHIRE MUNICIPALITIES 16-17 (1997) (indicating that buffers may reduce the amounts of sediments, nutrients, pathogens, and other pollutants in surface runoff from entering water bodies); Rowan D. Barling & Ian D. Moore, *Role of Buffer Strips in Management of Waterway Pollution: A Review*, 18 ENVTL. MGMT. 543, 547 (1994) (noting significant reductions of nutrients by buffer strips). Because application of manure on sloping land increases opportunities for runoff, restrictions based on the slope of lands may reduce contamination. Ronald A. Fleming & James D. Long, *Animal Waste Management: Measuring the Cost of Restricting Access to Cropland for Manure Nutrient Management*, 94 AGRONOMY J. 57 (2002).

with impunity.[253] In the absence of reasonable efforts by monitoring agencies to detect noncompliance and to bring enforcement actions, some operators may elect not to comply with CAFO regulations. With the revised regulations reducing the expected costs of noncompliance, CAFOs have a diminished incentive to comply with the new federal regulations.[254]

Greater enforcement of these regulations would also address the unfairness of a system in which the vast majority of CAFOs that impair water quality are not punished for their violations. The inequalities created by a regulatory system in which wrongdoers are not held accountable for their infractions penalizes CAFOs that are complying with the law.[255] More extensive enforcement efforts may also be expected to promote the long-run viability of the animal production sector.[256] Rather than regulating additional CAFOs, augmented enforcement efforts may offer superior strategies to combat water quality problems. Through increased resources for noncompliance monitoring and detection efforts, regulatory agencies might meaningfully reduce the amount of pollutants entering waterways.

The General Accounting Office reported in January 2003 that the EPA's limited oversight of state NPDES programs has contributed to inconsistent and inadequate implementation of the federal CAFO regulations.[257] This supports a conclusion that regulators could reduce some discharges of pollutants by being more effective in enforcing existing regulations. Given the anticipated lack of new resources for state regulatory efforts, the General Accounting Office recommended that the EPA should increase its oversight of state programs.[258] While this might involve withdrawing a state's authority to administer its NPDES program, the EPA has never taken such drastic action.[259]

The revised regulations fail to provide greater oversight by the EPA or to include procedures critical in helping states oversee their NPDES programs. Although the proposed rules had delineated provisions for the certification of nutrient management plans and co-permitting of integrators, the final regulations omitted these two enforcement techniques.[260] In the absence of federal assistance for enforcing CAFO regulations, states and citizens will need to fill the void.

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253. *See supra* notes 101-04 and accompanying text.

254. These CAFOs would probably be operations that would incur substantial costs in complying with the permitting regulations and those that would be financially stressed by the revised regulations.

255. These CAFOs spend money to comply with the law to eliminate discharges to waterbodies, while producers who violate the law do not incur compliance costs.

256. Cory & Germani, *supra* note 21, at 513.

257. GAO 2003, *supra* note 2, at 7.

258. *Id.* at 14-15.

259. *Id.* at 11. The GAO reported also that the EPA never has withheld grants from states that did not fully implement an NPDES program. *Id.*

260. *See supra* notes 225-49 and accompanying text.